No. 12944

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT

McNAIR REALTY COMPANY, a Corporation,
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,
Appellee.

GAMBLE-SKOGMO, INC., a Corporation,
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT, McNAIR REALTY COMPANY

Upon Appeal From the District Court of the United States for the District of Montana

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McNair Realty Company.

Filed....., 1951.

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SUBJECT INDEX

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JURISDICTION

District Court: The action is one for a declaratory judgment brought by Gamble-Skogmo, Inc., a Delaware Corporation, against McNair Realty Company, a Montana

Corporation. (R. p. 3). The District Court had jurisdiction under the provisions of 63 Stat. 105, Sec. 2201, Title 28, U. S. C. A. provided the amount in controversy exceeds $3000.00. The complaint, (R. pp. 3-8), contains the following allegations:

(a) "The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00)." (R. p. 3).

(b) "The defendant claims that it is entitled to a rental of two per cent (2%) on all such sales and that, therefore, the plaintiff is indebted to the defendant for a sum of money in excess of Three Thousand Dollars ($3000.00), exclusive of interest and costs, although the exact sum claimed by the defendant is not known to the plaintiff." (R. p. 5).

(c) "The right of the plaintiff to continue and remain in possession of the above described demised premises under said written lease is of great value to the plaintiff, namely, of the value of over Three Thousand Dollars ($3000.00)." (R. p. 7).

By its complaint Appellee, Gamble-Skogmo, Inc., seeks a declaratory judgment with respect to a certain written lease, (R. pp. 9-23), whereunder it, as the tenant of McNair Realty Company, occupied certain store premises in Great Falls, Montana. The relief sought is as follows, (R. pp. 7, 8):

"Wherefore, plaintiff, as a party interested under said written lease of December 27, 1943, prays this Court for a declaration of the rights and duties of the parties hereto under said written lease and the facts hereinabove set forth:

(a) As to whether the plaintiff owes the defendant any sum of money as rental;

(b) As to whether or not the plaintiff is in default of any of the covenants contained in said written lease;

(c) As to whether the said written lease is terminated and forfeited;

(d) As to whether the defendant is entitled to immediate possession of the said demised premises;

(e) As to the relationship under which the plaintiff now occupies said demised premises and the correct rental therefor."

The proof discloses, (R. pp. 93, 199), that the total delinquent rental claimed by the defendant was in excess of $5000.00. Even though the value of the lease to Appellee is not disclosed by the evidence, (S. S. Kresge Co. v. Godfried, 59 Fed. Supp. 843), it would appear that the amount involved is sufficient to confer jurisdiction upon the District Court.

Court of Appeals: The lower court's decision was rendered on February 15th, 1951. (R. p. 44). Findings of Fact and Conclusions of Law were made on February 24th, 1951. (R. p. 57). Judgment was entered on March 14th, 1951. (R. p. 60). Notice of Appeal was filed April 2nd, 1951 with proper Undertaking on Appeal. (R. pp. 60-62). The judgment made and entered on March 14th, 1951 was a final judgment and thus appealable to this Court. (Kasishke v. Baker, CAC. Okla. 144 Fed. (2d) 384). The appeal and record were docketed on May 22nd, 1951. (R. p. 370). The delay was occasioned by the cross appeal filed by Gamble-Skogmo, Inc. on April 13th, 1951. (R. pp. 63, 64). It is evident, therefore, that this Court has jurisdiction of the appeal.

I.

STATEMENT OF THE CASE

It appears from the complaint, (R. pp. 3-8), and the

answer, (R. pp. 25-32), that on December 27th, 1943 the McNair Realty Company and Gamble-Skogmo, Inc. entered into a written lease covering a store building and basement known as 521-523-525 Central Avenue in Great Falls, Montana. The lease is attached as Exhibit "A" to the complaint. (R. pp. 9-22). The lease provided for a yearly base rental of $5400.00 per year plus a percentage rental based upon 2% "on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars ($270,000.00) per lease year, had and obtained on the above described premises." (R. p. 10). The lease also contained the following provisions which are important here:

(a) "Time is the essence of this lease and all the provisions hereof." (R. p. 10).

(b) The additional percentage rental "is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars ($270,000.00) or on any general wholesale business done as provided for." (R. p. 11).

(c) "If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears

of rent or preceding breach of covenants." (R. p. 19).

The Appellee, Gamble-Skogmo, Inc., took possession of the premises under the lease, and thereafter "made certain net retail sales of farm equipment" upon which the Appellant, McNair Realty Company, claims the percentage rental should apply. (R. pp. 4, 5).

On October 3rd, 1949 McNair Realty Company gave notice to Appellee of the termination of the lease. This notice is attached to the complaint as Exhibit "B", (R. pp. 23, 24), and is as follows:

"October 3, 1949

"Gamble-Skogmo, Inc.,
700 Washington Avenue North,
Minneapolis, Minnesota.

Gentlemen:

McNair Realty Co. of this City has turned over to us for our attention the controversy which has existed for several months between you and the McNair Realty Co. concerning rents payable under your lease dated December 27, 1943. The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated. In the immediate future, without further notice, McNair Realty Co. will re-enter the premises pursuant to paragraph 16 for the purpose of remodeling the same for rental to others. Action for rentals due will thereafter be filed. Please govern yourself accordingly."

On October 10th, 1949 demand was made upon the manager for the immediate possession of the premises.

(R. p. 6). Later the Appellee was notified in writing that "commencing October 3rd, 1949 your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of $300.00 per day until McNair Realty Company has regained possession." (R. pp. 6, 25).

By its complaint, based upon the above facts, the Appellee advances the following claim:

(a) That the farm sales were not "had and obtained" on the demised premises. (R. pp. 4, 5), and that Appellee was not required to account for or pay a percentage upon such sales.

(b) That if plaintiff "has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists." (R. p. 6).

(c) That the lease has not terminated and Appellant is not entitled to possession of the premises, and that the daily rental of $300.00 per day "is unjust, unreasonable, and has not been agreed upon by the parties." (R. p. 7).

The claims made as above on behalf of the Appellee were met by denials and allegations contained in Appellant's Answer, which, so far as important here, are as follows, (R. pp. 27, 28, 29):

"Denies that said plaintiff duly or otherwise performed all of the covenants in said lease binding upon it, and in this behalf defendant alleges that plaintiff failed, refused and neglected to make and deliver to defendant a full, true or correct accounting, quarterly or otherwise or at all, covering the net retail sales or general wholesale business done by plaintiff as provided for in said lease, although such accounting was many times demanded by defendant. Instead, over the written and oral protests of defendant, plaintiff furnished to

defendant false, incomplete and incorrect so-called quarterly accountings of such sales which were, from time to time, rejected by defendant. By reason of such arbitrary and unreasonable breach by plaintiff of the terms and covenants of said lease on its part to be performed, defendant was unable to ascertain the true and correct amount of rental to be paid by plaintiff under the terms of said lease until the 24th day of October, 1949, upon which date the deposition of Dale Cockayne, manager for plaintiff of plaintiff's Great Falls store, was taken and his testimony perpetuated under the provisions of Sections 10687 to 10692 of the Revised Codes of Montana, 1935. By the testimony of said Cockayne, and the records of plaintiff introduced in evidence as a part of said deposition, it was disclosed that plaintiff was indebted to defendant for rental for the period 1947, 1948 and 1949 to October 19, 1949, in a sum in excess of $5,161.00. Defendant admits that subsequent to March 1, 1944, and particularly during the years 1947, 1948 and 1949 plaintiff made net retail sales of farm equipment and other items, but specifically denies that said sales were had and obtained elsewhere than on the premises described in said lease, and in this behalf defendant alleges that said farm equipment and other items were advertised for sale by Gambles Store located upon said premises; the greater part of the sales of such equipment and items were initiated and consummated on said premises; all sales slips, contracts and moneys were handled by the business office located in said premises; all sales were made under the supervision of the manager of said store; and, said farm equipment and other items was treated and considered by plaintiff as a unit or department of its store located upon said premises, all as shown and disclosed by the records of plaintiff introduced in evidence in the deposition of Dale Cockayne, aforesaid. Admits that defendant claimed and now claims that it is entitled to an additional rental by reason of such sales, and that, therefore plaintiff is indebted to the defendant in a sum of money in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs. Denies that the exact sum claimed by defendant

is not known to plaintiff. Specifically denies that plaintiff denies such claim of defendant, or that plaintiff contends that said sales of farm equipment and other items were not within the provisions of paragraph 2 of said lease, and in this behalf defendant alleges that on or about the 24th day of October, 1949, the said plaintiff offered to pay to said defendant the sum of $5,161.60 as and for additional rental due defendant by reason of retail sales of such farm equipment and other items, which offer was by said defendant accepted, and that no controversy now exists or existed at the time of the filing of plaintiff's complaint with respect to such matter. Said sum of $5,161.60 has not been paid by plaintiff to defendant."

With issue thus joined, it was apparent that the principal questions were: (1) Did the Appellee make full and complete accountings quarterly to Appellant for all net retail sales, including sale of farm equipment; and, (2) did the Appellee pay to the Appellant the rental to which it was entitled under the lease?

The lower Court disposed of those questions in its opinion as follows, (R. pp. 34-36):

"However, there were certain sales of farm implements and equipment made by lessee upon which the two per cent rental payment was never made, and which lessor claims were improperly withheld in violation of the express terms of the lease, and this affords the principal cause of contention in this suit. The lessee asserts that the sales of farm implements and equipment were conducted from a building across the alley and on a separate lot from the department store on Central Avenue, and was established as a separate and distinct business that was not in contemplation by the parties at the time the lease was executed and constituted no part of the rental agreement and therefore could not be included in the net retail sales to which the percentage clause applied. The lessor claims that all such retail sales were

'had and obtained on the above-described premises,' according to the evidence and terms of the lease, and the argument advanced in support of this contention in general is that the only Gamble Store operated in Great Falls was the department store at 521-523-525 Central Avenue and was conducted by one manager, who had charge of unit No. 5 of the store for sale of farm equipment, all advertising, display in store, approved credit sales and received all money. From the department store customers were taken to the place or places of storage of farm equipment, except when such implements or equipment were on display in the store, and in furtherance of the claim that sales made of farm implements and equipment were as much 'had and obtained' upon the premises at the above numbers as any other sales made in the usual course of business, counsel for lessor has submitted a clear and succinct statement of the evidence in his brief which lends support to his argument. The evidence as shown by the statement referred to and by the transcript is so plain and convincing that there seems to be no question how and where the sales and disposition of agricultural implements and accessories were 'had and obtained.'

"Although counsel argue that farm equipment sales were not in contemplation at the time the lease was signed, there seems to be no point to that argument; the parties agreed to a percentage rental on all retail sales above $270,000.00; there was no specification of sales of any particular kind or description of property sold, or to be sold, to which the rent would apply apart from the general provision. Without further discussion of this subject the court is of the opinion that there should have been included in computing the 2% on all retail sales over $270,000.00 the amount of sales of farm implements and accessories; and to that extent the plaintiff would be indebted to defendant for additional rental."

By its Findings of Fact and Conclusions of Law and

Judgment, (R. pp. 44-60), the court again disposed of such questions.

With the Findings of Fact, Conclusions of Law, and Judgment above quoted the Appellant finds no fault and claims no error upon this appeal. However, after determining the default of the Appellee in respect to accounting and payment of rental, the Court went further with respect to the right of Appellant to terminate the lease and take possession of the premises. In Findings of Fact X, XI and XII, the Court found as follows, (R. pp. 54, 55):

"X.

"In its Complaint herein the plaintiff alleges that 'the plaintiff is ready, willing and able to make full compensation to the defendant' for its default in the payment of rent, if any such default be found by the Court, and, plaintiff through its agent, at the trial of the action, agreed that the plaintiff was 'ready, willing and able to make full compensation for that rent with interest, costs and damages' in the event that this Court decided that plaintiff was in default."

"XI.

"By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereafter set forth."

"XII.

"The amount of compensation to be paid by plaintiff to defendant shall be as follows: The sum of $5,931.18 principal and interest, constituting the rental due defendant as herein set forth with interest thereon at 6% per annum, together with interest on said sum at 6%

per annum until paid; the further sum of $362.25 taxed as costs in this case with interest thereon at 6% per annum until paid. The Court further finds that by reason of the filing of this action and the trial thereof the defendant was required to and did procure the services of attorneys, and is obligated to compensate such attorneys for their services."

The lower Court then concluded, (R. pp. 56, 57) as follows:

"III.

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court and that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease, unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein."

"V.

"Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period,"

and decreed by its judgment, (R. p. 59), that:

" * * * by the tender on March 6th, 1951, of the sum of $6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to,

and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease * * * ."

It is with reference to this portion of the Findings, Conclusions and Judgment that the Appellant, McNair Realty Company, asserts error. The only possible basis for granting the Appellee such relief is found in paragraph V of the Complaint, (R. p. 6), in which the Appellee asserts:

"The Plaintiff further contends that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists,"

and in the testimony of an employee of Appellee at the trial, (R. pp. 178, 179):

"Q. Now, if this court or another court of competent jurisdiction decides that you owe, that Gamble-Skogmo, Inc., owes the defendant McNair Realty Company some back rent, is the plaintiff Gamble-Skogmo, Inc., ready, willing and able to make full compensation for that rent with interest, costs and damages?

"A. Yes, sir, Gamble-Skogmo are ready and willing to compensate in the event the court decides.

"Q. In full?

"A. In full.

"Q. And that compensation would include rent, interest, costs and damages, would it?

"A. Correct, yes, sir.

"Q. Is this in any way an admission that the plaintiff Gamble-Skogmo, Inc., now owes the defendant any sum of money for rental or damages?

"A. No, sir."

Opposed to these affirmations of good faith and a willingness to pay we find, first, a willful refusal to either account for or pay the additional rental after repeated demands made by the Appellant over a long period of time. (Defendant's Exhibits 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 267, 268, 269, 270, 273, 280; Exhibit 26, R. pp. 348, 349); second, a statement in the complaint filed by Appellee that "the exact sum claimed by the defendant is not known to the plaintiff," (R. p. 5); third, an absolute refusal to pay or tender any sum until the Court decided against its contentions.

It will, therefore, be the contention of the Appellant herein that the Court erred, under the pleadings and the evidence, in granting to the Appellee relief from a termination of the lease.

II.

SPECIFICATIONS OF ERROR RELIED UPON

1. The lower Court erred in making Finding of Fact Numbered XI, as follows, (R. pp. 54, 55):

> "By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereinafter set forth,"

in that:

(a) By Finding of Fact Numbered VII the lower Court found that "plaintiff was in default in the payment of rent reserved for more than two consecutive rental

periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason of such default said lease was on October 3rd, 1949, and has been at all times since, subject to termination by defendant." (R. pp. 53, 54).

(b) By Finding of Fact Numbered IX the lower Court found that the defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof. (R. p. 54).

(c) At no time prior to March 6th, 1951, (R. p. 66) did the Appellee pay or tender to the Appellant or pay into Court any sum of money as rental or compensation due the Appellant in or to be relieved of a termination or forfeiture of the lease.

(d) The refusal of Appellee to either account to Appellant or to pay the additional rental due was willful and grossly negligent.

(e) The Finding is directly contrary to the express provisions of the lease prepared by Appellee and relied upon by it, wherein it is provided that, "Time is the essence of this lease and all the provisions hereof," and that upon default it shall be lawful for the Appellant to terminate the lease. (R. pp. 10, 19).

2. The lower Court erred in making Conclusion of Law Numbered III, (R. p. 56) as follows:

> "The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession

of the premises described in said lease, unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein,"

in that:

(a) Said Conclusion is contrary to Findings of Fact Numbered VII, VIII and IX. (R. pp. 53, 54).

(b) Said Conclusion is contrary to Conclusion Numbered II. (R. p. 56).

(c) The lower Court was without jurisdiction in this proceeding to relieve the Appellee from a termination of the lease which had been properly and legally effected by the action of the Appellant on October 3rd, 1949. (Findings of Fact, VIII and IX, R. p. 54).

3. The lower Court erred in decreeing, adjudging and declaring "that by the tender on March 6th, 1951, of the sum of $6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease;" (R. p. 59), in that:

(a) This portion of the judgment is contrary to para-

graphs 1 and 2 of said judgment which are as follows, (R. pp. 58, 59):

"1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947 to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of $5,177.70.

"2. By reason of such defaults the defendant was entitled, under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949."

(b) The lower Court was without jurisdiction to relieve from a termination of the lease which had been properly and legally effected on October 3rd, 1949.

(c) This portion of the judgment is contrary to the express agreement of the parties as set forth in the lease prepared by and relied upon by Appellee.

(d) The lower Court was without jurisdiction to relieve the Appellee, in this action, from a termination of the lease incurred by reason of a breach of covenant to account as well as a breach of agreement to pay rent.

(e) The refusal of the Appellee to either account or pay additional rent was willful and grossly negligent.

(f) This portion of the judgment is contrary to Findings of Fact Numbered VII, VIII and IX, (R. pp. 53, 54) and to Conclusion of Law Numbered III, (R. p. 56).

III.

SUMMARY OF ARGUMENT

A. The lease here involved was prepared by the Appellee upon its own form and expressly provides:

"Time is of the essence of this lease and all the provisions hereof."

"If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

B. In this action the lower Court had jurisdiction only to adjudge and declare that there had been a breach of and default in the terms and covenants of the lease by the Appellee and a proper termination of the lease by reason thereof, and it could not then convert itself into a court of equity and relieve from a termination which had been already properly and legally effected.

C. The covenants of the lease which were breached by the Appellee were not such as could be compensated for by the payment of delinquent rental and interest.

D. There was no tender of delinquent rental or offer to account to Appellant prior to the commencement of the action, nor at any time prior to the entry of the Findings

of Fact and Conclusions of Law, and Appellee may not, therefore, claim relief in equity.

E. The refusal of the Appellee to either account to Appellant or to pay the rental due for a period of three years was willful, fraudulent and grossly negligent.

IV.

ARGUMENT

A. The Provisions of the Lease.

The lease here involved was prepared by Gamble-Skogmo, upon its own printed form. (R. pp. 76, 77). Among its various provisions are the following:

> "Time is the essence of this lease and all the provisions hereof." (R. p. 10).
>
> "If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

In passing it is interesting to note also that by various provisions of the lease the Appellee is given the right to terminate the lease (a) for a failure to repair, (R. p. 13); for partial destruction of the premises by fire, (R. p. 16); by reason of the enactment of anti-chain store legislation,

(R. pp. 19, 20); or just because it so desires, (R. pp. 20, 21).

It is the rule in Montana that, while forfeitures are not favored, contracts making time of the essence thereof and providing for their termination on default are not contrary to law or public policy, and courts will not undertake to make new contracts for the parties, but will enforce such provisions in a contract unless waived, or the party for whose benefit the provisions are inserted is estopped from asserting them, or performance has been prevented by circumstances sufficient to relieve the defaulting party from performance.

Huffine v. Lincoln,
87 Mont. 267, 282, 287 Pac. 629;

Fratt v. Daniels-Jones Co.,
47 Mont. 487, 133 Pac. 700;

Edwards v. Muri,
73 Mont. 339, 237 Pac. 209.

This is but a statement in different words of the rule which has long prevailed in equity. Thus in 30 C. J. S., p. 395, it is said:

"The exercise of the jurisdiction to relieve against forfeitures demands in most cases the application of the equitable doctrine that time is not essential, and that a failure to perform within the appointed time may be relieved against where compensation may be made for the delay. However, except in so far as affected by equitable circumstances considered infra subdivision c, of this section relief will be denied where the time of performance is made essential by the express terms of the contract. . . ."

See:

Gas & Electric Securities Co. v. Traction Corp.,
CCA., N. Y., 266 Fed. 625.

B. The Power of the Lower Court in This Action.

The action here is one for a declaratory judgment under the provisions of Section 2201, Title 28, U. S. C. A., (63 Stat. 105). This section provides:

> "In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

There is here involved a written lease between the parties containing various provisions as to which the Appellee here desired an interpretation or declaration. The first of such provisions relates to the obligation of the Appellee to account for net retail sales made by Appellee and to pay to Appellant a percentage thereon. (R. pp. 10, 11). The controversy with respect to such provision of the lease revolves around net retail sales of farm equipment and machinery made by Appellee during the period commencing January 1st, 1947 and extending to December, 1949. (R. pp. 4, 5). The second of such provisions relates to the right of the Appellant to terminate the lease by reason of a default in the payment of rent or by reason of a default in the performance of the other covenants of the lease. (R. p. 19).

In its Findings of Fact the lower Court found as follows:

Finding No. V:

> "The defendant, at all times has claimed that the plaintiff, under the terms of its lease, was required to

pay to defendant a 2% additional rental upon all net retail sales made as aforesaid by the farm unit or department of the 'Gamble's Store,' but the plaintiff has at all times denied such claim, and has at all times refused to account quarterly or otherwise to defendant for any retail sales made, as aforesaid, by said farm unit, and has at all times since January 1st, 1947, refused to pay, quarterly or otherwise, to defendant the 2% additional rental arising out of such retail sales."

Finding No. VII:

"By reason of the refusal of the plaintiff to account to defendant for such net retail sales of the farm department or to pay to defendant the additional rental due to defendant under the terms of the lease, arising out of such sales, said plaintiff breached the terms and provisions of such lease, and at the time of the filing of plaintiff's Complaint, and at the time of the trial of this action said plaintiff was in default in the payment of rent reserved for more than two consecutive rental periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason of such defaults said lease was on October 3rd, 1949, and has been at all times since, subject to termination by defendant."

Finding No. IX:

"The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof."

In its Conclusions of Law the lower Court said:

Conclusion No. 1:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is indebted to the defendant in the sum of $5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, together with interest upon

such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of $5,931.18.

Conclusion No. 2:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is in default with respect to the covenants contained in said lease relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff."

Conclusion No. 3:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease. . . ."

In its judgment the lower Court adjudged, decreed and declared as follows, (R. pp. 58, 59):

"1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947 to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of $5,177.70.

"2. By reason of such defaults the defendant was entitled, under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949."

It is quite evident, therefore, that the Court interpreted the provisions of the lease against the contentions and claims of the Appellee; that the Appellee was in default

both in the payment of rent and the performance of other covenants of the lease; and, that the Appellant had legally and properly terminated the lease between the parties. On October 3rd, 1949, Appellant, through its attorneys gave written notice to the Appellee of the termination of the lease, in part as follows, (R. pp. 23, 24):

> "The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated."

This notice was given more than a month and a half prior to the filing of the present action. Thus, under the Court's Findings of Fact, Conclusions of Law and Judgment, the lease was terminated prior to the filing of the action.

Some suggestion may be made in the answer brief of Appellee that in the notice of termination the amount of the delinquent rent was not stated. But this was a matter of which the Appellee had exclusive knowledge. Demand after demand had been made for an accounting of farm sales, each of which were either wholly ignored or refused. (See Exhibit 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 263, 265, 267, 268, 270, 273, 280; Exhibit 26, R. pp. 348, 349). It was, indeed, only after the store records had been subpoenaed into State Court and the deposition of Appellee's Manager taken that Appellant for the first time was able to calculate the delinquent rental due it. (Answer, R. pp. 27, 28; Evidence, R. pp. 296, 297).

Under such circumstances, it is the contention of the Appellant that when the lower Court adjudged and declared that the Appellee was in default and that the lease had been properly terminated it could not then turn itself into a court of equity and relieve the Appellee from a forfeiture which had taken place more than a month prior to the filing of the complaint.

It was, indeed, an anachronism for the lower Court to say to Appellee—you have been in default in performance since 1947; the Appellant has, before the action was commenced, rightfully terminated the lease and is entitled to possession; but, I will, if you make certain payments, reinstate the lease between you and the Appellant and you can remain in possession.

In Standard Brands v. Bryce, 1 Cal. (2d) 718, 37 Pac. (2d) 446, the Supreme Court of California said:

> "When, as here, the cause of action has already accrued and the only question for determination is the ultimate liability of one party on account of consequential relief to which another is shown to be entitled, it has been held that the nature of the action is not a cause for declaratory relief, but is defined by the subject-matter of the accrued cause of action. See In re Sterrett's Estate, 300 P. 116, 150 A. 159, 162; Kaaa v. Waiakea Mill Co., 29 Haw. 122, 127, 128; see, also, notes in 12 A. L. R. 74-76; 50 A. L. R. 43, 44; 68 A. L. R. 119."

See also:

> Fritz v. Superior Court,
> 18 Cal. App. (2d) 232, 63 Pac. (2d) 872.

From and after October 3rd, 1949, according to the Findings of Fact, Conclusions of Law and Judgment of the lower Court, the Appellee had no further rights, duties

or obligations under the lease which had been terminated. Appellee could have, at any time prior to October 3rd, 1949, brought this action for the purpose of ascertaining its duties and liabilities under the lease. That it should have done so is apparent. Having failed to act until the Appellant had acted and the lease was terminated the Appellee cannot now seek relief in a declaratory judgment action asking for an interpretation of the lease. When by a breach of the Appellee's obligations under the lease its rights and duties thereunder have become fixed according to the law and the contract between the parties, the court cannot, in this proceeding, restore the parties to a status quo ante and from that vantage point then proceed to declare their rights under a lease which does not exist.

C. The Breach of Appellee's duties under the lease could not be compensated by the payment of money.

In its decision the lower Court said, (R. pp. 41, 42):

"However, something remains to be said by the Court on the subject of forfeiture in this case. The plaintiff has quoted the special statute on the subject of relief from forfeiture (Sec. 17-102, R. C. M. 1947) which provides: 'Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.'

* * * * *

"Under the provisions of the special statute quoted the court has authority in a proper case to relieve from forfeiture upon making full compensation."

Citing:

United States v. Forness,
37 Fed. Suppl. 337;

Davis v. Taylor,
51 App. D. C. 97, 276 Fed. 619;

Sheets v. Selden,
7 Wall. 416, 19 L. Ed. 166;

Prout v. Roby,
82 U. S. 471, 15 Wall. 471;

In re Gutman, D. C. 197 Fed. 472;

Sechrist v. Bryant,
52 App. D. C. 286, 286 F. 456.

The basis for the above decisions is thus stated in Davis v. Taylor, 51 App. D. C. 97, 276 Fed. 619:

> " 'Interpreting the covenant of the lease in question in the light of the law, as we must do, it signifies that, since the forfeiture provided for therein, *has the single purpose of the payment of the rent,* the moment the rent, interest and costs are paid or tendered, provided this is done while the tenant is in possession, the forfeiture disappears. The debt having been paid there is no occasion for resorting to the security.' " (Italics ours).

But in the present case the termination of the lease is *not* based upon the single reason of non-payment of rent. The lease here requires, (a) a quarterly accounting, and (b) payment of additional rent based upon that accounting, (R. pp. 10, 11), and further provides for a termination after default in (a) "payment of the rent" and (b) in "any of the covenants and agreements herein contained to be kept by the Lessee." (R. p. 19).

The lease here involved is what is known as a percentage lease. Such a lease serves a peculiar purpose. As stated by the witness, Chester McNair, (R. pp. 212, 213):

"Well a percentage lease serves a peculiar purpose. In this wise it effects more nearly equitable partnership so to speak between landlord and tenant in this fashion, that both participate in good business and to a degree both participate in poorer business. It is usually put into effect with a minimum guarantee which is designed to take care of certain fixed expenses, taxes, insurance and depreciation, repairs if you like, and thereafter there is a participation as between landlord and tenant with the ups and downs of fortunes in the business over an extended period of time. For instance, a landlord or tenant might be reluctant to tying himself over a ten-year period to a fixed flat rental. The landlord might be reluctant for the reason if the value of the premises went up he wouldn't be able to participate. The tenant would be reluctant because if the value goes down, he would still be tied to a higher flat rental, and so to iron out and make participation an equitable arrangement percentage leases are used and that gives stability over length of term to both.

"Q. It is a compromise arrangement to take care of the good years and bad years?

"A. That is true.

"Q. From the standpoint of the landlord as well as the tenant?

"A. That is right."

That the accounting of sales under a percentage lease is most important to the landlord is evident. Such accountings constitute the only method through which the landlord can ascertain whether or not he is receiving the proper rental from the tenant. Such accountings are the veritable foundation of the lease. The witness, William T. Hill, agent of Appellee, testified, (R. pp. 183, 184):

"Q. You are familiar with the fact that the accounting period under the lease here involved is quarterly income?

"A. Yes, sir.

"Q. Would that mean to you that an accounting is to be made of the wholesale and net retail sales for the prior quarter?

"A. Yes, sir.

"Q. And if there is a rental payable on the basis of the lease that is a percentage rental that a check should accompany that account, is that correct?

"A. That is correct.

"Q. Well now what sort of an accounting should be made under a lease of this character which requires a quarterly accounting?

"A. Well that originates from sales records and expenses in the retail store which it covers. That in turn is forwarded to Denver to the retail office daily. They transcribe that on a regular form which is provided showing all of the other incidentals, profits and otherwise, a copy of which is sent to the Minneapolis home office division of Gamble-Skogmo, Inc., upon which the accounting department computes quarterly, semi-annually or annual sales.

"Q. And these daily accountings made by the store and then sent to Denver and by Denver to the office in Minneapolis are these sheets here that Mr. Cockayne was testifying from, are they not?

"A. That is correct.

"Q. And are available both to the Minneapolis office and Denver regional office daily?

"A. Those sheets are not prepared daily. The sales records from the store as well as the expense items are forwarded to Denver. These are monthly statements, Mr. Hall.

"Q. So that sometime right after the end of each quarter the Minneapolis office has a full and complete accounting of all sales made?

"A. That is correct.

"Q. Of wholesale or retail?

"A. That is correct.

"Q. In all of the departments of each individual store, that is the situation?

"A. That is correct, yes, sir.

"Q. Now what did Gamble-Skogmo mean by a quarterly accounting to be rendered to McNair Realty?

"A. In each three months a transmittal would be forwarded to McNair Realty indicating the sales required or accomplished in that period of time."

With respect to the required accountings the witness, Chester McNair, testified, (R. p. 296).

"A. That notice was served—well, it was, I think, October 3rd, if I am thinking of the same notice.

"Q. Yes, October 3rd, 1949?

"A. October 3rd, 1949.

"Q. Now after that—at that time did you have any information—and when I say 'you'—did McNair Realty have any information as to the amount of the wholesale sales and the farm sales which had been omitted from the accountings made by the Gamble-Skogmo Company over a period of years or the amounts which they owed you for rental?

"A. No information.

"Q. For those items?

"A. No information.

"Q. You had never received any such information from the Gamble-Skogmo Company?

"A. No.

"Q. Did you take any steps to obtain that information?

"A. Why, yes. You, as counsel, subpoenaed Mr. Cockayne and his records for a deposition.

"Q. And his deposition was taken on October 24th, 1949?

"A. That is true.

"Q. And at that time he produced the store records showing the total retail sales and the total wholesales in evidence?

"A. That is true.

"Q. And those are the store records which we have in court today, is it not?

"A. That is true."

Thus, until October 24th, 1949, the Appellant had no knowledge of the amount of delinquent rental owed to it by Appellee. The record here shows demand after demand for the required accountings without result. (Exhibit 16, R. pp. 189, 190, 192, 193, 195, 261, 263, 265, 266, 267, 268, 273, 280; Exhibit 26, R. pp. 348, 349.) Finally, the Appellant was forced to bring the records into Court and take the deposition of Appellee's Manager. (R. p. 296). This was done at the expense of hiring counsel, as well as the expenditure of time, all of which could have been well avoided had the Appellee lived up to its lease.

In 21 C. J. p. 102, sec. 77, the rule is thus stated:

"While equity will relieve a tenant from forfeiture for nonpayment of rent at the time it is due, although the breach is willful on the part of the tenant, it will not generally grant relief for breach of other covenants, in the absence of other equitable circumstances, it being impossible for the tenant to show affirmatively that compensation can be made. Thus relief is not ordinarily given in case of the breach of a covenant to insure, to make repairs, to pay taxes, or to do or not to do any specific act."

See also:

30 C. J. S. Sec. 56 (b), pp. 394, 395;

Brewster v. Lanyon Zinc Co.,
72 CCA. 213, 140 Fed. 801;

Pierce v. New York Dock Co.,
CCA. N. Y., 265 Fed. 148;

Gas & Electric Securities Co. v. Traction Corp.,
CCA. N. Y., 266 Fed. 625.

The Appellee, neither in its complaint or its evidence, suggests a method through which the breach of the covenant to account is or could be compensable. Thus it fails to state a cause for relief from forfeiture under Section 17-102, Revised Codes of Montana, 1947, quoted supra. Under that statute, before plaintiff may appeal to a court of equity for relief from a forfeiture it must "set forth facts which appeal to the conscience of a court of equity."

Estabrook v. Sonstelie,
86 Mont. 435, 440, 284 Pac. 147;

Ellinghouse v. Hansen Packing Co.,
66 Mont. 444, 449, 213 Pac. 1087;

Huston v. Vollenweider,
101 Mont. 156, 164, 53 Pac. (2d) 112.

No such facts are alleged and proven here. Indeed, the Appellee's own proof shows a callous indifference to the requests and demands of Appellant. Paraphrasing the language of Justice Swayne in Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166, "a case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the *appellee* throughout the difficulties between the parties is not persuasive to lend it its aid."

D. Failure of Appellee to Make Tender.

The Appellee at all times knew the exact amount due the Appellant upon net retail sales of farm equipment and farm machinery. In fact, until October 24, 1949, Appellee

was the only one who had such knowledge. With this knowledge the Appellee refused at all times to make any accounting and not until after the filing of the lower Court's Findings of Fact and Conclusions of Law did the Appellee make any tender of the amount of rent claimed to be due and which its own records showed to be due. (R. p. 66).

In the case of Huffine v. Lincoln, 87 Mont. 267, 282, 287 Pac. 629, the Supreme Court of Montana, said:

"But even if the statute is applicable and, while it is true that forfeitures are not favored, contracts making time of the essence thereof and providing for their termination on default are not contrary to law or public policy, and courts will not undertake to make new contracts for the parties, but will enforce such provisions in a contract unless waived, or the party for whose benefit the provisions are inserted is estopped from asserting them, or performance has been prevented by circumstances sufficient to relieve the defaulting party from performance. (Fratt v. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700.)

"The defendant, George Lincoln, was put on his guard early in March, 1927, and even though, as contended, the notice then given was an 'arbitrary notice that the contract was at an end,' this defendant knew that, under the contract he then had ten days in which to repair his default, yet he did nothing then, nor thereafter during the six months elapsing between that notice and the commencement of the action, although he was specifically notified twenty days before the action was commenced that unless he acted within ten days the contract would be terminated. Had he, as he now claims, been unable to make tender by reason of lack of knowledge as to the balance due, he could at least have made that claim to plaintiff, before his rights became forfeited, and sought an adjustment. As to this claim made for the first time in the answer filed, having heard his tes-

timony and observed the witness on the stand, the trial court found that his claim 'was untrue,' and with this finding we cannot interfere.

"The court's finding, coupled with defendants' failure to make timely attempt to protect their rights under the contract, establishes a 'willful breach' of the contract by either 'inability or unwillingness to perform.' (Oscarson v. Grain Growers Assn., above)."

See also:

30 C. J. S. p. 397;
Bonfils v. Ledoux,
CCA., 266 Fed. 507;

Suburban Homes Co. v. North,
50 Mont. 108, 19, 145 Pac. 2;

Yellowstone County v. Wight,
115 Mont. 411, 418, 145 Pac. (2d) 516.

Here, after demands, commencing in July, 1948, and continuing thereafter, for an accounting and payment of the delinquent rental the Appellee did nothing other than to ignore or refuse Appellant's requests. In the action filed herein, it takes the position that it owes nothing. During the trial it took the same position. While offering to pay "full compensation" in its complaint, (R. p. 6), and through its agent at the trial, (R. pp. 178, 179), this offer was contingent upon an unfavorable decision by the court, and there was no payment or tender of payment until after such decision. Appellee gambled and lost and now desires to have its lease reinstated. Its failure to make a timely attempt to protect its rights under the lease established a willful breach of contract by either inability or unwillingness to perform.

Huffine v. Lincoln,
87 Mont. 267, 282, 287 Pac. 629.

E. The Refusal to Account or to Pay the Rental Due was Willful, Fraudulent and Grossly Negligent.

At the trial the Appellee relied upon and the lower Court's decision on the matter of relief from forfeiture was based upon Section 17-102, Revised Codes of Montana, 1947, which is as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Section 19-103, subd. 15, provides that the word "willfully" "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Actual fraud is defined by section 13-308, R. C. M., 1947, as follows:

> "ACTUAL FRAUD, ACTS CONSTITUTING. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> 3. The suppression of that which is true, by one having knowledge or belief of the fact;
>
> 4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

Constructive fraud is defined by Section 13-309, R. C. M., 1947, as follows:

"CONSTRUCTIVE FRAUD. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,

2. In any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud."

Gross negligence is defined as a failure to use slight care.

Batchoff v. Craney,
119 Mont. 157, 166, 172 Pac. (2d) 308.

That the Appellee acted "willfully" in the matter of its refusal to account for farm sales or to pay the percentage rental due thereon appears too plain for argument.

Our Section 17-102, herein relied upon by the Appellee, apparently came from Section 3275 of the California Civil Code which is identical. Section 3275 was construed by the California Supreme Court in the case of Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702, to which the attention of the court is called. This decision has been followed by the California Courts down to the present day.

El Rio Oils v. Chase, Cal. App.,
207 Pac. (2d) 885.

In other portions of our brief, (pp. 15, 25, 32) we have called the Court's attention to the repeated requests and demands made by Appellant for an accounting of farm

equipment sales made by Appellee and the payment of additional rental due.

The only replies ever made to such repeated demands and requests are found in two letters—one from the Real Estate Department dated September 27, 1948, and one from Appellee's General Counsel dated November 15, 1948. (R. pp. 269, 279). The last of such letters closes with the following words, (R. p. 280):

> "There is no point in reporting the sales of the farm store to you."

Appellee knew of the demands of Appellant, both for an accounting and for payment, throughout the period July, 1948 to October, 1949. (R. pp. 196, 197). Nevertheless it knowingly, willingly, and purposely refused either to account or to pay. This "unwillingness" to perform the plain provisions of the lease constituted a "willful breach" of the contract between Appellant and Appellee.

> Huffine v. Lincoln,
> 87 Mont. 267, 268, 287 Pac. 629.

The suppression of the facts with reference to farm sales constituted fraudulent conduct under the provisions of Section 13-308, R. C. M., 1947.

Under the facts it seems clear that the provisions of Section 17-102, R. C. M., 1947, cannot here apply even though we should concede the power of the Court to grant such relief in a proceeding such as this.

It is respectfully submitted that the portion of the judgment whereby the lower Court afforded relief to Appellee from the termination of the lease, and in effect reinstated the lease should be reversed.

Respectfully submitted,

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SERVICE admitted this.....day of....., 1951.

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Attorneys for the Appellee,
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